STATE GOVERNMENT OF SARAWAK

v.

CHIN HWA ENGINEERING DEVELOPMENT CO.

SUPREME COURT, KUCHING
TAN SRI DATO' HJ. MOHD AZMI KAMARUDDIN FCJ
TAN SRI DATO' EDGAR JOSEPH JR. FCJ
DATO' MOHAMED DZAIDDIN HJ. ABDULLAH FCJ
[CIVIL APPEAL NO. 01-36-94]
25 SEPTEMBER 1995

ARBITRATION: *Award of arbitrator - Validity - Jurisdiction - Whether arbitrator had jurisdiction to hear disputes and award damages - Parameters of jurisdiction - Right to arbitrate - Determination - Whether disputes covered by arbitration clause.*

ARBITRATION: *Award of arbitrator - Enforcement of award into judgment - When could be resisted - Passive remedy - Meaning of - Circumstances where passive remedy would avail to a party - Arbitration Act 1952 s. 27.*

WORDS & PHRASES: *" as to any matter or thing of whatsoever nature arising thereunder or in connection therewith".*

By a contract they had entered into the appellant employed the respondent to carry out bakau piling works for the embankment of the so called Sungai Santubong bridge in Sarawak. While works were in progress, disputes arose as to the size of the bakau piles provided by the respondent and in the upshot, the appellant sent a letter to the respondent suspending it "from future tendering until further notice". The respondent took it that the appellant had wrongfully repudiated the contract and hence vacated the work site and left the work uncompleted.

Pursuant to arbitration of the disputes under clause 43 of the contract, the arbitrator decided for the respondent and awarded damages for breach of contract and for wrongful suspension of its tender registration. The appellant had confirmed that steps were being taken to effect payment of the award but subsequently changed its mind and informed the respondent that it viewed the award as void, and that it would resist action to enforce the same. The respondent nonetheless commenced enforcement proceedings under s. 27 Arbitration Act 1952, and following that, the award was confirmed by the High Court. The trial Judge in essence ruled that the award was conclusive as the appellant, having done nothing to challenge the award prior to the application for leave to enforce it, was precluded from questioning the same. The appellant appealed and argued before the Supreme Court (i) that the award was wrong as the arbitrator had no jurisdiction under clause 43 either to determine the validity of the suspension order or to award damages for the alleged wrongful suspension, and (ii) that its failure to challenge the enforcement proceedings much earlier was not fatal as it could always avail itself of passive remedy when resisting the award.

Held:

Per Edgar Joseph Jr. FCJ (delivering the judgment of the Court):

[1] A party may, in certain circumstances, avail himself of a passive remedy. This means that he does not take the initiative to attack an award but simply waits and only resists when the opponent seeks to enforce the award.

[2] Passive remedy would be available where the award is so defective in form or substance that it is incapable of enforcement, and secondly, where the whole or part of the award is ineffective on the ground that the relief granted lies outside the jurisdiction of the arbitrator.

[3] In the instant case the appellant's complaint was that the arbitrator had no jurisdiction to determine the validity of the suspension order and, consequently, no jurisdiction to award damages for alleged wrongful suspension since the matters in dispute were outside the scope of clause 43 of the contract. This being the case it was open to the appellant to have had recource to the passive remedy in resisting the enforcement proceedings in question. Whether or not the appellant succeeds is a different matter.

[4] Whether the matters in dispute here did or did not fall outside the scope of clause 43 of the contract is a question of construction and therefore a question of law. *Inter alia*, clause 43 defines the jurisdiction of the arbitrator in terms of "any dispute or any difference as to any matter or thing of whatsoever nature arising thereunder or in connection therewith". Under arbitration clause of this nature, the existence of a dispute or difference within the meaning of the clause is a condition precedent to the right to arbitrate.

[5] Upon its proper construction, the expressions "as to any matter of whatsoever nature, arising thereunder or in connection therewith", occuring in clause 43 were of sufficient amplitude to take in a dispute as to the validity of the suspension order dated 18 March 1986. It follows therefore that the dispute between the parties in the present case came within the terms of the said clause 43 and the arbitrator accordingly had jurisdiction to embark upon the hearing.

[Appeal dismissed. Order of Judge below affirmed]

[**Bahasa Malaysia** Translation of Headnotes]

TIMBANGTARA: *Award Penimbangtara - Keesahan - Bidangkuasa - Samada penimbangtara mempunyai bidangkuasa untuk mendengar pertikaian dan mengawardkan gantirugi - Keluasan bidangkuasa - Hak untuk menimbangtara - Penentuan - Samada pertikaian dirangkumi oleh fasal timbangtara.*

TIMBANGTARA: *Award penimbangtara - Penguatkuasaan award kepada penghakiman - Bilakah boleh ditentang - Remedi pasif - Maksud - Keadaan dimana remedi pasif boleh digunakan oleh sesuatu pihak - Akta Timbangtara 1952 s. 27.*

PERKATAAN & ISTILAH: *"as to any matter or thing of whatsoever nature arising thereunder or in connection therewith." (berhubung dengan apa-apa perkara atau benda yang bersifat apapun yang terbit di bawahnya atau sehubungan dengannya).*

Melalui satu kontrak yang telah mereka masuki, perayu telah melantik responden untuk menjalankan kerja-kerja cerucuk bakau bagi benteng jambatan Sungai Santubong di Sarawak. Ketika kerja-kerja sedang dijalankan, pertikaian terbit berhubung dengan saiz cerucuk-cerucuk bakau yang dibekalkan oleh responden dan kesudahannya, perayu telah mengirimkan surat kepada responden, menggantungnya "daripada memasuki tawaran di masa-masa akan datang sehingga diberikan notis yang selanjutnya". Responden menganggapkan bahawa perayu telah secara salah menyangkal kontrak tersebut dan dengan itu telah mengosongkan tapak kerja dan meninggalkan kerja tersebut dalam keadaan tidak siap.

Berikutan timbangtara pertikaian tersebut di bawah fasal 43 kontrak, penimbangtara telah memutuskan bagi pihak responden dan mengawardkan gantirugi atas kemungkiran kontrak serta bagi penggantungan secara salah pendaftaran tendernya. Perayu telah mengesahkan bahawa langkah-langkah sedang diambil untuk menguatkuasakan pembayaran award tersebut tetapi kemudiannya telah menukar fikiran dan memaklumkan kepada responden bahawa ia

menganggap award tersebut sebagai tak sah, dan bahawa ia akan menentang sebarang tindakan untuk menguatkuasakannya. Namun begitu responden memulakan juga prosiding penguatkuasaan di bawah s. 27 Akta Timbangtara 1952, dan berikutan itu, award tersebut telah disahkan oleh Mahkamah Tinggi. Hakim perbicaraan secara pentingnya memutuskan bahawa award tersebut adalah muktamad, oleh kerana perayu, setelah tidak melakukan apa-apa untuk mencabar award tersebut sebelum permohonan dibuat bagi menguatkuasakannya, adalah dihalang daripada mempersoalkannya. Perayu merayu dan berhujah di hadapan Mahkamah Agung (i) bahawa award tersebut adalah salah kerana penimbangtara tidak mempunyai bidangkuasa di bawah fasal 43 samada untuk menentukan keesahan perintah penggantungan tersebut atau untuk memberikan gantirugi bagi penggantungan secara salah yang dikatakan itu, dan (ii) bahawa kegagalannya untuk mencabar prosiding penguatkuasaan tersebut lebih awal lagi tidak memudaratkan kerana ia sentiasa boleh memanafaatkan remedi pasif bilamana menentang award tersebut.

Diputuskan:

Oleh Edgar Joseph Jr. HMP (menyampaikan penghakiman Mahkamah):

[1] Sesuatu pihak boleh, dalam keadaan-keadaan yang tertentu, memanafaatkan remedi pasif. Ini bermaksud bahawa beliau tidak berusaha untuk menentang sesuatu award tetapi menunggu sahaja dan hanya menentang bilamana penentang cuba untuk menguatkuasakan award tersebut.

[2] Remedi pasif akan kedapatan di mana sesuatu award itu amat tidak sempurna dalam bentuk atau substansnya, sehinggakan ia tidak lagi boleh dikuatkuasakan, dan keduanya, di mana keseluruhan atau sebahagian dari award itu tidak berkesan oleh kerana relief yang diberikan terkeluar daripada bidangkuasa penimbangtara.

[3] Dalam kes semasa ini, aduan perayu adalah bahawa penimbangtara tidak mempunyai bidangkuasa untuk menentukan keesahan perintah penggantungan tersebut dan berikutan itu, tiada bidangkuasa untuk mengawardkan gantirugi bagi penggantungan secara salah yang dikatakan itu oleh kerana perkara yang menjadi pertikaian berada di luar lingkungan fasal 43 kontrak tersebut. Dalam keadaan ini, ianya adalah terbuka kepada perayu untuk berpaling kepada remedi pasif dalam menentang prosiding penguatkuasaan yang dipersoalkan. Samada perayu berjaya ataupun tidak adalah suatu perkara lain sama sekali.

[4] Samada perkara-perkara yang dipertikaikan di sini terlingkung atau tidak terlingkung oleh fasal 43 kontrak tersebut adalah persoalan pentafsiran dan dengan itu suatu persoalan undang-undang. Antara lainnya, fasal 43 mentafsirkan bidangkuasa penimbangtara sebagai berhubung dengan "any dispute or any difference as to any matter or thing of whatsoever nature arising thereunder or in connection therewith" (apa-apa pertikaian atau mana-mana perbezaan berhubung dengan apa-apa perkara atau benda yang bersifat apapun yang terbit dibawahnya atau sehubungan dengannya.) Di bawah fasal timbangtara yang bersifat sebegini, kewujudan sesuatu pertikaian atau perbezaan di dalam maksud fasal tersebut adalah syarat duluan kepada hak untuk menimbangtara.

[5] Berlandaskan pentafsirannya yang betul, ungkapan "as to any matter of whatsoever nature, arising thereunder or in connection therewith", yang terdapat dalam fasal 43 adalah cukup luas untuk menerima pertikaian berhubung dengan keesahan perintah penggantungan tersebut bertarikh 18 Mac 1986. Dengan itu didapati bahawa pertikaian antara pihak-pihak dalam kes semasa ini adalah terlingkung di dalam terma-terma fasal 43 dan dengan itu penimbangtara mempunyai bidangkuasa untuk mendengar perbicaraan yang berbangkit.

[Rayuan ditolak. Perintah Hakim di bawah disahkan]

Cases referred to:
Middlemiss and Gould v. Hartlepool Corporation [1973] 1 AER 172 ***(refd)***
Heyman v. Darwins Ltd. [1942] AC 356, 366 (HL) ***(foll)***
Union of India v. Aaby (EB)(EB)'s Rederi A/S [1975] AC 797 (HL) ***(foll)***

Legislations referred to:
Arbitration Act, 1952, ss. 24(2), 27
Arbitration Act (U.K) , s. 26
Rules of the High Court, 1980, O. 69 r. 2(3), r. 4(1)

Other source referred to:
Commercial Arbitration, Mustill and Boyd, 2nd Edn., p. 546

For the appellant: Datuk J.C. Fong (Abdul Rahman Seblin with him); State Legal Adviser.
For the respondent: Margaret Loy (Kho Lik Kiat with her); M/s Chan Kho & Loy.

JUDGMENT

Edgar Joseph Jr. FCJ:

This appeal from a judgment and order of the High Court, at Kuching, giving leave to enforce an award of an arbitrator dated 29 May 1992 as a judgment or order to the same effect pursuant to s. 27 of the Arbitration Act, 1952 ("the Act"), arises out of an originating summons relating to a construction contract for civil engineering works, to wit, bakau piling for the embankments of the proposed Sungai Santubong Bridge along the proposed Kuching Santubong/Teluk Bandung Road, Sarawak ("the contract") entered into by the appellant, the State Government of Sarawak as employer ('the employer") and the respondent Chin Hwa Engineering Development Co., as contractor ("the contractor").

All references to "dollars" in this judgment are to "Malaysian Ringgit".

The contractor had taken possession of the site in early December 1985 and piling work had commenced at the end of that month. During the progress of the construction work, disputes arose between the contractor and the employer regarding the size of the bakau piles provided; more particularly whether they complied with the specifications stipulated in the contract. In the upshot, the employer, through its Deputy Director of Works issued a letter dated 18 March 1986, addressed to the contractor suspending the contractor from future tendering until further notice, in the following terms:

Public Works Department
Headquarters
Jalan Simpang Tiga
Kuching
Sarawak

18 March 1986.

Chin Hwa Engineering Development Co.,
Lot 273, 1st floor, Beautiful Jade Centre,
P.O. Box 544,
Miri.

Dear Sirs,

Suspension From Future Tendering

This is to inform you that you are hereby suspended from future tendering until further notice.

"Hidup Selalu Berkhidmat"

Yours faithfully,

sgd.

Director of Public Works,
Sarawak.

The contractor treated the letter as evincing an intention on the part of the employer not to continue with the contract and therefore a wrongful repudiation thereof. Accordingly, on 27 March 1986, the contractor left the site leaving the works uncompleted and treated the contract as discharged.

Then followed a notice by the contractor to the employer referring the dispute to arbitration pursuant to clause 43 of the contract which was in the following terms:

> Provided always that in case any dispute or difference shall arise between the employer or the engineer on his behalf and the contractor, either during the progress or after the completion or abandonment of the works, as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this contract to the discretion of the engineer or the withholding by the engineer of any certificate to which the contractor may claim to be entitled or the measurement and valuation mentioned in clause 15 of these conditions or the rights and liabilities of the parties under clause 30, 40 or 41 of these conditions), then either party shall forthwith give to the other notice in writing of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed upon between the parties in accordance with and subject to, the provisions of the Arbitration Ordinance, and the award of such arbitrator shall be final and binding on the parties. Such reference, except on the questions whether or not a certificate has been improperly withheld or is not in accordance with clause 35 of these conditions, or on any dispute or difference under clauses 40 or 41 of these conditions, shall not be opened until after the completion or alleged completion or abandonment of the works, unless with the written consent of the employer or the engineer on his behalf and the contractor. Subject to the provisions of clause 35(g) of these conditions the arbitrator shall without prejudice to the generality of his powers have power to direct such measurements and/or valuations as may in his opinion be desirable in order to determine the rights of the parties and to ascertain and award any sum which ought to have been the subject of or included in any certificate and to open up, review and revise any certificate, opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given.

Both the contractor and the employer then agreed upon an arbitrator. The case was then duly heard by the arbitrator ending in an award ("the award") made by the arbitrator in favour of the contractor as follows:

(1) Damages for breach of contract and/or repudiation pursuant to paragraph 29 of the points of claim in the sum of RM136,306.90;

(2) Special damages for breach of contract pursuant to paragraph 31 of the points of claim in the sum of RM32,343.00;

(3) General damages for wrongful suspension of its tender registration pursuant to paragraph 32 of the points of claim in the sum of RM552,584.00;

(4) Interest on (1) and (2) at the rate of 8% p.a. from date of the arbitration i.e. 24 January 1990 till final payment and on (3) at the same rate from 25 April 1990 till full payment; and

(5) Costs of the award (including arbitrator's fee, expenses, hiring room for the hearing) and costs of reference (including costs properly incurred by the plaintiff in the course of the arbitration).

Following an exchange of correspondence on 9 November 1992, costs of both the award and the reference had been agreed at RM70,400. Then by a letter dated 15 July 1992, the solicitors for the employer wrote to the solicitors for the contractor stating that necessary steps were being taken to effect payment of the arbitrator's award. However much to the surprise of the contractor, the employer by a letter dated 11 September 1992, changed its tune, saying:

11 September 1992

M/s Matthew T K Chan & Co.
Advocates
Room 202, 2nd Floor
Wisma Bukit Mata Kuching
Jalan Tunku Abdul Rahman
93100 Kuching

Dear Sirs

Re: Contact for Bakau Piling for the embankments of proposed Sungai Santubong Bridge along the proposed Kuching/Santubong/Teluk Bandung Road, 1st Division - Arbitration Proceedings

I refer to your letter dated 7 September 1992 requesting for payment of the award by the arbitrator.

2. The arbitrator had exceeded his jurisdiction or acted without jurisdiction in making the Award.

3. The Award is, therefore, void.

4. Any action taken by your clients to enforce the award will be strongly resisted.

"Bersatu Berusaha Berbakti"

Sgd.

(Francis Johen Ak Adam)
Senior Legal Officer for State Attorney-General Sarawak

c.c. State Financial Secretary Sarawak.

In consequence, the contractor commenced the proceedings hereinbefore mentioned by way of originating summons for leave to enforce the award pursuant to s. 27 of the Arbitration Act. As pointed out at the outset, the Judge granted the contractor's application and confirmed the award of the arbitrator, first in chambers and then, upon hearing further argument, in open Court.

The grounds upon which the Judge so ordered were that the employer was precluded from questioning the award of the arbitrator, since prior to the application for leave to enforce the award as a judgment or order to the same effect under s. 27 of the Act, the employer did nothing to question the award; for example, the employer did not take any step to have the award set aside under s. 24(2) of the Act within the period of 6 weeks from the date of publication of the award limited by O. 69 r. 4(1) of the Rules of the High Court, 1980, or at all, nor did it apply under O. 69 r. 2(3), for a declaration that the award was not binding on it.

In the result, the Judge held that the award was final and conclusive. He found support for this view in the decision of the Court of Appeal in *Middlemiss and Gould v. Hartlepool Corporation* [1973] 1 AER 172 which is authority for the proposition that once an award has been made and the time limit for challenging it has expired, the award has become irrevocably final and binding and it can therefore be entered as a judgment and enforced accordingly. Lord Denning who was the presiding Judge in that case said that the summary method of enforcing an award under s. 26 of the English Arbitration Act, which is in *pari materia* with s. 27 of the Act, is to be used in nearly all cases and leave should be given to enforce the award as a judgment unless there is a real ground for doubting the validity of the award. So, the mere fact that there was a point of law which one side or the other thought might have been wrongly decided did not make the award invalid.

The Judge went on to hold that the dispute did lie within clause 43 of the contract because it was a dispute over a matter in connection with the contract. But, then, with respect, he appears to have retreated somewhat from this conclusion, when he went on to say:

> ... The award being final and binding on the parties, it is for the defendnat to honour it. Since the defendant had failed to do so, it is proper for the plaintiff to institute this proceeding for leave to enforce it. Having so held, I found that it is no longer necessary for me to determine whether or not the arbitrator has jurisdiction or lack the jurisdiction to decide on the dispute referred to it by the plaintiff and the defendant pursuant to the said clause 43 of the contract and to hand down the award as he did in this case.

Before us, the Attorney-General on behalf of the employer, had attacked the judgment of the Court below on the ground that it failed to recognise that the arbitrator had no jurisdiction to determine the validity of the suspension order which ought to have been, but was never challenged by way of judicial review, and, in consequence, he had no jurisdiction to award damages for the alleged wrongful suspension. It was therefore said that so much of the award as decide that the contractor was entitled to damages for wrongful suspension should be set aside and leave to enforce the award under s. 27 of the Act, should have been refused by the Judge.

By way of amplification, it was argued that the Judge had misdirected himself in holding, as he did in fact hold, that the employer was precluded from challenging the validity of the award for the first time, at the very late stage of enforcement proceedings under s. 27 of the Act, when it was open for it to have done so at a much earlier stage, under s. 24(2) of the Act or under O. 69 r. 2(3) of the Rules of the High Court, 1980. In support, our attention was directed to the following passage in *Commercial Arbitration* by Mustill and Boyd (2nd Edn.), at p. 546:

> A party who avails himself of a passive remedy does not himself take the initiative to attack the award, but simply waits until his opponent seeks to enforce the award by action or summary process, and then relies upon his matter of complaint as a ground why the Court should refuse enforcement.

It was implicit in the submissions of the Attorney-General that what he was contending for was a ruling by this Court that the arbitration clause 43 - was not wide enough to confer jurisdiction upon the arbitrator to determine the questions:

(1) Whether the suspension of the contractor from future tendering, until further notice, was unlawful and

(2) If so, what was the appropriate sum to award by way of damages for wrongful suspension.

We agree, that in certain circumstances, a party may avail himself of a passive remedy by which is meant he does not take the initiative to attack an award, but simply waits until his opponent seeks to enforce the award by action or summary process, when he resists enforcement. Mustill and Boyd on *Commercial Arbitration* (2nd Edn) p. 546 have instanced two situations when the passive remedy would be available; namely:

1. where the award is so defective in form or substance that it is incapable of enforcement.
2. where the whole or part of the award is ineffective on the ground that the relief granted lies outside the jurisdiction of the arbitrator.

In the circumstances, we agree with the submission of the Attorney-General that it was open to the employer to have had recourse to the passive remedy of resisting the enforcement proceedings under s. 27 of the Act by relying on its complaint that the Arbitrator had no jurisdiction to determine the validity of the suspension order and, consequently, no jurisdiction to award damages for alleged wrongful suspension, these being matters in dispute which were outside the scope of clause 43 of the contract. Whether or not the employer is entitled to succeed in this contention is, of course, a separate matter, and it is to this question that we must now direct our attention.

Whether the matters in dispute did or did not fall outside the scope of clause 43 of the contract which speaks of any dispute or difference as to any matter or thing of whatsoever nature arising under the contract or in connection with the contract, is a question of construction and therefore a question of law.

To recapitulate, it was during the course of construction of the works, that disputes had arisen between the contractor and the employer about the size of the bakau piles provided by the contractor for the project, in particular, whether they were in accordance with the specifications stipulated in the contract. As a result, the employer had by its letter dated 18 March 1986 addressed to the contractor, suspended the contractor "from future tendering until further notice". The contractor therefore took the position that the employer had thereby wrongfully repudiated the contract. The contractor next vacated the site leaving the works uncompleted and treated the contract as discharged.

We note that the portions of the arbitration clause appearing in clause 43 of the contract, so far as material to the present case, are in *pari materia* with those appearing in the RIBA form sanctioned by the Royal Institute of British Architects. Clause 43 therefore defines the jurisdiction of the arbitrator in terms of, *inter alia*, "any dispute or difference", *inter alia*, "as to any matter or thing of whatsoever nature arising thereunder or in connection therewith". Under arbitration clauses in this form, the existence of a dispute or difference within the meaning of the arbitration clause is a condition precedent to the right to arbitrate.

It is obvious that the perimeters of the arbitrator's jurisdiction must be determined having regard to the interpretation of the particular agreement in each case. And, Mustill and Boyd on *Commercial Arbitration* (2nd Edn) at p. 117 have helpfully reminded us that:

> When faced with the problems of jurisdiction, the Courts have usually confined themselves to considering whether a particular type of issue falls within the compass of a particular form of words. In general, they have not embarked upon exposition of the scope of any particular form of words, particularly since one often finds more than one formula used in the same clause and when comparisons have been drawn between the effects of various formulae, the results have not always been consistent. This being so there is little profit in attempting a detailed survey and grading of the various forms in common use.

Nevertheless, where the agreement provides for disputes or differences which have arisen "in respect of", or "with regard to" or "under" (*Heyman v. Darwins Ltd.* [1942] AC 356, 366 (HL)) or "out of" (*Union of India v. Aaby (E.B.)(E.B.)'s Rederi A/S* [1975] AC 797 (HL) the contract, or where similar words are used, then, taken at their full face value, it will give the arbitrator jurisdiction to decide all allegations of breach of contract by either party. The decision of the House of Lords in *Heyman v. Darwins Ltd.* decided that an arbitrator appointed by virtue of a clause "with regard to" or "under" has jurisdiction to decide whether a contract has been repudiated by one of the parties.

It appears to us that the root of the matter is that the suspension of the contractor from future tendering and the losses suffered by the contractor thereby, were the direct result of the disputes regarding the adequacy of the bakau piles provided by the contractor in performance of the contract. It is our view, therefore, that the expressions "as to any matter of whatsoever nature, arising thereunder or in connection therewith", occurring in clause 43 are of sufficient amplitude to take in a dispute as to the validity of the suspension order dated 18 March 1986. It follows, therefore, that the dispute between the parties in the present case came within the terms of the clause 43 of the contract and that the arbitrator accordingly had jurisdiction to embark upon the hearing.

In the result, we dismiss the appeal with costs, and affirm all the orders made by the Judge for payment out by the employer to the contractor of the various sums of money ordered by him including costs of the award and of the reference. Deposit to be paid out to the contractor to account of its taxed costs.